A

SUHAIMI MOHD YUSOF

v.

PP

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG JC
[CRIMINAL REVISION NO: T(43) 08-2005]
18 NOVEMBER 2005

C ***CRIMINAL PROCEDURE:*** *Arrest - Remand order - No reason given for making remand order - Whether remand order valid - Whether District Officer sitting as second Class Magistrate empowered to order remands in excess of three days*

D ***CRIMINAL PROCEDURE:*** *Court - Practice Directions - Whether Practice Directions have force of law or are merely guidelines*

The applicant applied pursuant to s. 323 of the Criminal Procedure Code ('CPC') to revise the order of remand made by the Kunak District Officer on 24 October 2005 remanding the
E applicant for a period of 14 days expiring on 6 November 2005 (hereinafter referred to as the Kunak Remand). The applicant was arrested on 22 October 2005 at around 9.40pm in relation to a customs offence under s. 135(1)(d) of the Customs Act 1967. On the following Monday, that is 24 October 2005, the applicant was
F brought before the Kunak District Officer and an application for a remand of 14 days was made by the police. The Kunak District Officer granted the application without giving any reasons. He merely recorded the name of the applicant, the nature of offences and the remand period in a book where remand orders are
G recorded.

Paragraph 2(xi) of Practice Direction "Arahan Amalan Ketua Hakim Negara Bil. 3/2003 Perintah Penahan Dibawah Seksyen 117 Kanun Prosedur Jenayah" (herein referred as the 2003
H Remand Directions) provides as follows:

> Perintah tahanan yang diberikan oleh pegawai tersebut hendaklah tidak melebihi 3 hari kecuali bagi Mahkamah litar di Negeri Sabah dan Sarawak. Sekianya tahanan lanjut difirkan perlu selepas tamat tempoh 3 hari, pegawai polis yang berkenaan hendaklah
I mengemukakan orang yang disyaki di hadapan Magistret Daerah itu atau Magistret yang berhampiran.

The learned DPP contended that the 2003 Remand Directions contravened s. 117 of the CPC. The learned DPP pointed out that the Kunak District Officer by virtue of his office is an *ex officio* Second Class Magistrate and that the powers of a Second Class Magistrate is similar to that of a First Class Magistrate. The question which therefore arose was whether the 2003 Remand Directions could override the provisions of s. 117 of the CPC. The 2003 Remand Directions direct that District Officers sitting as Second Class Magistrates should only remand suspects no more than three days whereas s. 117 of the CPC permits a term not exceeding fifteen days. If 2003 Remand Directions are strictly to be complied with, it will supercede s. 117 of the CPC.

Held:

[1] The 2003 Remand Directions are merely guidelines for the Second Class Magistrates to follow and its intention was to ensure uniformity of practice in respect of s. 117 of the CPC in the country. If Parliament had wanted to differentiate the powers of the First and Second Class Magistrates in remand, they would and could have done so very easily. (pp 192 I & 193 A)

[2] The 2003 Remand Directions do not have the force of law. For practice directions to have any force of law they must be issued pursuant to legislation. The 2003 Remand Directions themselves do not refer to any provision of law. The 2003 Remand Directions were not issued pursuant to any provision of law. The then Chief Justice issued them as guidelines to the District Officers sitting as Second Class Magistrates and never intended them to have the force of law. (pp 193 B, 194 C, E & 195 A)

[3] The Kunak District Officer sitting as a second Class Magistrate had the power to order remands in excess of three days. But that did not mean that the Kunak Remand was proper. The Kunak District Officer gave no reason for his remand order. He merely recorded the remand period of the applicant. Reasons must be given for remand. The Kunak District Officer gave no reason whatsoever for the remand, which showed that he did not exercise his judicial mind, which he was required in law to do so. Therefore the Kunak Remand was set aside on the ground that it was not given according to law. (pp 195 D & 196 E)

[4] Although the 2003 Remand Directions do not have the force of law, they however should be followed by all especially the District Officers sitting as *ex officio* Magistrates so that Magistrates will be able to monitor the progress of the investigation and to ensure that justice is served on the suspects as well. (p 196 F - G)

Case(s) referred to:
Datuk Conrad Mojuntin & Ors v. PP (CRK 43-13-2005) ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia [2002] 1 CLJ 645 FC ***(refd)***
PP v. Leong Ying Ming [1993] 2 CLJ 143 SC ***(refd)***
PP v. Ottavio Quattrocchi [2003] 2 CLJ 613 CA ***(refd)***
Re Mohamad Ezam Mohd Noor [2002] 5 CLJ 156 HC ***(refd)***
Subramaniam Vythilingam v. The Humans Rights Commission of Malaysia & Ors [2002] 7 CLJ 357 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 117, 323
Customs Act 1967, s. 135(1)(d)
Rules of the Court of Appeal 1994, rr. 18(4)(d), (7), 77
Rules of the Federal Court 1995, r. 110
Rules of the High Court 1980, O. 14, O. 18 r. 19
Rules of the Supreme Court 1980, r. 138
Subordinate Courts Act 1948, s. 77

Other source(s) referred to:
Arahan Amalan Ketua Hakim Negara Bil. 3/2003, para. 2(xi)
Halsbury's Law of Malaysia, vol 18, p 6

For the applicant - Hamid Hamzah Mydin; M/s Amin Jaffar & Court
For the respondent - Gan Gan Peng DPP

Reported by Amutha Suppayah

JUDGMENT

David Wong JC:

This is an application made by Suhaimi bin Mohd Yusof, the applicant herein to revise the order of remand made by the Kunak District Officer on 24 October 2005 remanding the applicant for a period of 14 days expiring on 6 November 2005 (hereinafter referred to as Kunak Remand). This application is made pursuant to s. 323 of the Criminal Procedure Code (CPC) and no doubt prompted by the recent decision of the Kota Kinabalu High Court

on 26 October 2005 in the case of *Datuk Conrad Mojuntin & 3 Others v. Public Prosecutor* (CRK. 43-13-2005) (hereinafter referred to the *Mojuntin* case)

The facts were these. The applicant was arrested in his house in 22 October 2005 at around 9.40pm in relation to a customs offence under s. 135(1)(d) of the Customs Act 1967. On the following Monday, that is 24 October 2005, the applicant was brought before the Kunak District Officer and an application for a remand of 14 days was made by the police. In the aforesaid application, the police tendered the application itself together with three pages of police reports. The Kunak District Officer granted the application without giving any reasons. In fact he merely recorded the name of the applicant, the nature of offences and the remand period in a book where remand orders are recorded. On 28 October 2005 the applicant's solicitors, M/s Amin Jaafar & Co, wrote to the Tawau High Court to seek a revision of the Kunak Remand. Pursuant to the aforesaid letter, the court fixed a hearing on 2 November 2005. When the court sat on 2 November 2005, I was informed by the learned DPP that the applicant had on 31 October 2005 been released on police bail, which of course would make the application academic. That being the case, I asked learned counsel for the applicant whether or not he still wanted to proceed. He replied in the affirmative on the ground that a ruling from this court will serve as a guide for future cases. The learned DPP did not offer any rebuttal to the learned counsel's reply.

In an unreported case of Criminal Application No 44-09-2005-III(I) in the Kuching High Court, I was faced with a similar circumstance and relying on the *dicta* in *PP v. Ottavio Quattrocchi* [2003] 2 CLJ 613 I held that courts should only make academic ruling if it is in the public interests to do so. I also referred to the case of *PP v. Leong Ying Ming* [1993] 2 CLJ 143, where the Supreme Court held that "although our ruling would be academic for this case, we have decided to deliver this judgment as a guide for similar cases in the future".

The issue, which confronts me, is whether or not in the present case I should make an academic ruling. What we have here is an important legal issue of whether or not the practice directions issued by the then Chief Justice in 2003 on remands have the

force of law and to my knowledge there is only one judicial pronouncement by the courts on this issue. That pronouncement was the recent ruling in the *Mojuntin*'s case on 26 October 2005 by the Kota Kinabalu High Court in Sabah. In view of that fact and the apparent lack of legal training of District Officers acting as *ex-officio* Magistrate, I am of the view that I should deliver a judgment even though it may be academic.

Learned counsel for the applicant from the outset of this hearing relied soley on the ruling in the *Mojuntin* case to request this court to revise the Kunak Remand. In the *Mojuntin* case, the District Officer, Penampang on 24 October 2005 remanded Datuk Conrad Mojuntin and his three sons for 10 days and 7 days respectively (Penampang orders). The learned counsel there sought a revision of the Penampang orders and relied on the para. 2(xi) of Practice Direction Arahan Amalan Ketua Hakim Negara Bil. 3/2003 Perintah Penahan Dibawah Seksyen 117 Kanun Prosedur Jenayah (herein referred as 2003 Remand Directions) which reads as follows:

> Perintah tahanan yang diberikan oleh pegawai tersebut hendaklah tidak melebihi 3 hari kecuali bagi Mahkamah litar di Negeri Sabah dan Sarawak. Sekianya tahanan lanjut difirkan perlu selepas tamat tempoh 3 hari, pegawai polis yang berkenaan hendaklah mengemukakan orang yang disyaki di hadapan Magistret Daerah itu atau Magistret yang berhampiran

Learned counsel in the *Mojuntin* case submitted that the Penampang orders contravened the 2003 Remand Directions and hence illegal. His contention was that practice directions must be complied with and relied on the case *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia* [2002] 1 CLJ 645 (hereinafter referred as the *Megat Khas* case). The learned judge agreed with the learned counsel's contention and this can be seen from his ruling where he states as follows:

> Further based on the authority of *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia (supra)*, it is the view of the highest court in the country that practice direction "must be complied with for practice directions would have the force of law". This is the decision of the Federal Court and by the concept of *stare decisis*, I am bound by the said decision.

Learned DPP in the present case submitted that generally practice directions must be complied with provided that they do not contravene statutory rules in this case s. 117 of the CPC and relied also on the *Megat Khas* case.

In view of the fact that the learned judge in *Mojuntin*'s case had also relied on the *Megat Khas* case to justify his conclusion, it would be appropriate that I discuss the judgments of the *Megat Khas* case in some details.

The facts were these. The Court of Appeal dismissed the appellant's appeal from the High Court on the ground that they failed to comply with r. 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 ('RCA') as the appeal record included only a photocopy of the sealed order appealed from, and that the supplementary appeal record that incorporated a sealed copy of the order was filed out of time and without leave of court. The appellant obtained leave to appeal to the Federal Court and two questions were put before the Federal Court for consideration and they were:

(1) Whether the Federal Court had jurisdiction to determine this appeal from the Court of Appeal as it did not originate from the High Court in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction?

(2) Whether there was compliance with r. 18(4)(d) and (7) RCA when the appellant tendered the sealed copy of the order at the hearing before the Court of Appeal in open court in accordance with the Supreme Court Practice Direction No. 1 of 1992 ('the practice direction')?

For our purpose, only the findings on the second question are relevant. There were four written judgments, three of which formed the majority. The dissenting judge did not consider the second question as he was of the view that the Federal Court had no jurisdiction to determine the appeal.

In respect of the second question, two of the three majority judges, namely Steve Shim CJ (Sabah & Sarawak) and the late Mohtar Abdullah FCJ held that practice directions are only for administrative purposes and when they are in conflict with statutory procedural rules of courts which in that case were r. 18(4)(d) and (7) RCA, they have no legal effect. However

A Abdul Malek Ahmad FCJ (as he then was, now the President of the Court of Appeal) held that practice directions have the force of law if they are issued pursuant to written law (which in that case r. 77 of the Rules of the Court of Appeal) even though they may be in conflict with statutory procedural rules of courts.

B

I am thus faced with two conflicting principle of law. Be that as it may, I will apply them to the factual matrix in the present case.

Steve Shim CJ (Sabah & Sarawak) in his judgment states as follows:

C

> In *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor* [1995] 4 CLJ 484, it was held that Practice Directions were effected for administrative purposes. I accept that as a correct statement of the law. Undoubtedly, they provide guidelines for a more effective
> D implementation of the rules of court. They seek to clarify or highlight such rules. They may even, to some extent, modify them, but certainly they are not meant to supercede or deviate from court rules which have been statutorily laid down. To do so would, in my view, be a negation of the authority of Parliament which has conferred powers upon the Rules Committee under
> E s. 17 Courts of Judicature Act 1964 to make rules of court.
>
> It is true that the Chief Justice has been empowered under r. 110 Rules of the Federal Court 1995 to issue Practice Directions. So has the President of the Court of Appeal under r. 77 Rules of
> F the Court of Appeal. Nevertheless, it cannot have been in the contemplation of Parliament that they can issue Practice Directions in direct conflict with procedural rules of court which have been statutorily laid down. In my view, to the extent that such Practice Directions are in conflict, in the sense of superceding or deviating substantially from statutory rules of court, they are of no legal
> G effect whatsoever. Of course, once Practice Directions have been properly and legally issued, they must be complied with. I believe that to be trite: (see *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, P Pinang & Anor* [1996] 2 CLJ 628; *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakiam* [1999] 2 CLJ 972).

H Learned DPP contends that the 2003 Remand Directions contravene s. 117 of the CPC which reads as follows:

I

117. Procedure where investigation cannot be completed within twenty-four hours.

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.

(2) The Magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to transmission for trial by the High Court.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

As pointed out by the learned DPP, nowhere in the CPC is the word magistrate restricted to mean only 1st Class Magistrates in respect of s. 117 of the CPC. The Kunak District Officer by virtue of his office is an *ex officio* Second Class Magistrate, which is provided for under s. 77 of the Subordinate Courts Act 1948, and the Fourth Schedule of the aforesaid Act. Thus from a plain reading of s. 117 of the CPC, the power of a Second Class Magistrate is similar to that of a First Class Magistrate.

The question, which arises then, can the 2003 Remand Directions override the provisions of s. 117 of the CPC? To recap, the 2003 Remand Directions direct that District Officers sitting as Second Class Magistrates should only remand suspects no more than three days whereas s. 117 of the CPC permits a term not exceeding fifteen days. It is thus clear that if 2003 Remand Directions are strictly to be complied with, it will supercede s. 117 of the CPC. It is my view that the 2003 Remand Directions are

merely guidelines for the Second Class Magistrates to follow and its intention was to ensure uniformity of practice in respect of s. 117 of the CPC in the country. If Parliament had wanted to differentiate the powers of the First and Second Class Magistrates in remand, they would and could have done so very easily.

Accordingly applying the principle expounded by the Chief Judge of Sabah and Sarawak, and with respect, I beg to differ to the learned judge's ruling in the Mojuntin's case and hold that the 2003 Remand Directions do not have the force of law. My view is shared by the learned judge in the case of *Subramaniam Vythilingam v. The Humans Rights Commission of Malaysia & Ors* [2002] 7 CLJ 357 where he held that Practice Direction No 1 of 1995 which directed all O. 14 and O. 18 r. 19 RHC applications be heard by the Registrar did not have the force of law.

I come now to the principle of law expounded by Abdul Malek Ahmad FCJ, which is thus:

> Apart from the reassuring findings of the four Court of Appeal decisions, I would venture to say that the decision in *Ooi Bee Tat (supra)* cannot be correct. This is because practice directions would have the force of law as they are made under the relevant rules. Rule 77 of the RCA states:
>
> The President may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.
>
> Rule 138 of the Rules of the Supreme Court 1980, by which the present facts of this case are governed, provides:
>
> The Lord President may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.
>
> In fact, even with that being repealed by the Rules of the Federal Court 1995, r. 110 thereof has a similar provision which reads:
>
> The Chief Justice may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.
>
> Having analysed the relevant authorities and considered the arguments, for the reasons stated earlier, it is my view that the record of appeal was in fact in order as there was already a copy of the grounds of judgment enclosed therein.

> Further, placed in the predicament the appellant was in, they had duly complied with the relevant practice direction, which I hold to have the force of law, when the certified true copy of the order, the contents of which had never been challenged, was filed in the supplementary record of appeal within a few days of receiving it without making any application, and also by tendering the said copy at the hearing of the appeal after duly informing the respondent.

Though the view of Abdul Malek Ahmad FCJ may differ to that of Steve Shim CJ (Sabah & Sarawak) and Mohtar Abdullah FCJ, there is a common ground between them and that is for practice directions to have any force of law they must be issued pursuant to some legislations. In *Megat Khas* case, the directions were issued pursuant to r. 138 of the Rules of the Supreme Court 1980, which provides:

> The Lord President may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.

The issue, which arises here, is under what provision of law did the then Chief Justice issue the 2003 Remand Directions. The 2003 Remand Directions themselves do not refer to any provision of law. Apart from r. 110 Rules of the Federal Court 1995, I cannot find any other provision of law which may permit the Chief Justice to issue practice directions. Rule 110 of the Rules of the Federal Court 1995 reads as follows:

> The Chief Justice may from time to time give such directions with respect to the business in the Registry, as he may consider necessary.

If one looks at the aforesaid rule, directions must refer to "the business in the registry" which in my view cannot refer to type of directions given in 2003 Remand Directions. It could only refer to administrative matters of the registry. The 2003 Remand Directions in my view are beyond the administrative purviews as envisaged in r. 110 Rules of the Federal Court 1995 .It can only refer to the types of directions (contents in the Record of Appeal) given the *Megat Khas* case, which pertained to matters concerning the registry or directions as set out in the 2004 directions issued by the present Chief Justice, which directed the courts to give priority to certain criminal cases.

Accordingly I am of the view that the 2003 Remand Directions were not issued pursuant to any provision of law. This reinforces my view that the then Chief Justice issued them as guidelines to the District Officers sitting as Second Class Magistrates and never intended to have the force of law. Further as noted in vol. 18 *Halsbury's Law of Malaysia* at p. 6, the Criminal Procedure Code is for intent and purpose to be an exhaustive pronouncement of the law relating to criminal procedure in Malaysia.

Hence even applying the principle expounded by Abdul Malek Ahmad FCJ, I come to the same conclusion and that is the 2003 Remand Directions do not have the force of law.

Based on the above reasons, I hold that the Kunak District Officer sitting as a second Class Magistrate had the power to order remands in excess of three days.

But that does not mean to say that the Kunak Remand was proper. As stated earlier, the Kunak District Officer gave no reason for his remand order. He merely recorded the remand period of the applicant. For clarity I reproduce the record of proceeding:

Riki b Ismail	Sek 7(1)(a) Akta bhn	24.10.2005	6.11.2005
Suhami b Mohd Yussof	Kaisan Dan Ltpn Dan Senjata Merbahaya Sek 135(1)(d) Akta Kastam 1967		

The law is clear. Reasons must be given for remand. This is provided for in s. 117(3) of the CPC. In the case of *In Re Mohamd Ezam Mohd Noor* [2002] 5 CLJ 156, the learned judge held that in remand proceedings, Magistrates have a judicial duty to discharge and he puts that duty as such:

> While it is true that the said officer must first be satisfied that the accusation or information is well founded before he makes an application for remand, the magistrate has a judicial discretion to discharge. He must consider the nature of the information or accusation. He must consider whether based upon the copy of the entries in the diary of proceedings of investigation of the investigating officer, he agrees and accepts:

(a) that the information or complaint is well-founded;

(b) the investigation is not complete;

(c) that continued investigation could need witnesses and evidence to complete the investigations;

(d) that for that purpose the continued remand of the accused is necessary to ensure:

1. his attendance in court to be charged;

2. he does not interfere with witnesses; or

3. he does not interfere with other evidence yet to be collected.

There is therefore no legal basis for any argument he may be interrogated until he is forthcoming and assists in the investigation against him.

The 2003 Remand Directions also set out the steps to be taken by the Magistrates.

In the present case, the Kunak District Officer gave no reason whatsoever for the remand, which shows that he did not exercise his judicial mind, which he was required in law to do so. This being the case and in exercise of my revisonary power, I have no alternative but to and do hereby set aside the Kunak Remand on the ground that it was not given according to law.

Finally let me say that though I may hold the view that the 2003 Remand Directions do not have the force of law, they however should be followed by all especially the District Officers sitting as *ex officio* Magistrates so that, as correctly pointed out by the learned judge in the *Mojuntin* case, Magistrates will be able to monitor the progress of the investigation and to ensure that justice is served on the suspects as well.